IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.138 OF 1995

Prakash Suryabhan Londhe]
Age 23 yrs. r/o Civil]
Hospital Compound, Solapur]
Dist. Solapur]...Appellant

Vs.

1. The State of Maharashtra]
]
2. Smt.Vimal Ramu Londhe]
"Indira Nagar" Zopadpatti]
Ghatkopar, Bombay]..Respondents

....

Mrs.Rutuja Ambekar, Advocate for the Appellant
Mr.A.S.Shitole, A.P.P. for the State.
None for Respondent no.2 though served.

....

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : DECEMBER 15,2004

ORAL JUDGMENT:

1. Through this appeal, the appellant-original accused no.1 challenges the judgment and order dated 15th March, 1995 passed by the learned Sessions Judge, Solapur in Sessions Case No. 57 of 1994. By the said judgment and order, the appellant has been convicted for the offence under Section 376 of IPC and sentenced to undergo R.I. for seven years and to pay a fine of Rs.1500/- indefault to suffer R.I.

for six months. The learned Judge further directed that if the fine amount is recovered, Rs.1,000/- be paid to P.W.2 Vimal Rama Londhe.

. It may be stated here that original accused no.2 Sitabai Londhe the mother of appellant, was also prosecuted in the said case. The charge was framed against her for the offence under Section 376 read with Section 109 of IPC. However, she came to be acquitted of the said charge.

2. Briefly stated the prosecution case is as under:

. P.W.2 Vimal was residing with her mother P.W.1 Sarubai Londhe, her sister Kamal and husband of her sister and their children at Bombay. Appellant Prakash is the son of paternal uncle of Vimal. Prakash was residing with his mother Sitabai at Solapur. In the year 1993 just before 'Gudi Padva', Prakash came to Bombay to the house of Vimal and told her mother Sarubai that he would take Vimal with him to Solapur and he would teach her tailoring and would see that she would stand on her feet. Thereafter Sarubai sent Vimal along with Prakash. Only Sitabai and Prakash were residing in the house of Prakash. Sitabai was working in the civil

hospital at Solapur. Prakash used to take vimal for walks and to the cinema. It is the case of Vimal that one day when Sitabai was not at home, Prakash committed rape on her. Vimal informed Sitabai about this act when she returned home. However, Sitabai asked her to keep quiet and threatened her that if she disclosed this to anyone, both of them would kill Vimal. Thereafter, Prakash repeatedly committed rape on Vimal. Sitabai and Prakash threatened Vimal not to disclose this fact to anybody. A few days prior to the filing of the complaint, Kamal sister of Vimal, came to Solapur to the house of accused. On one or two occasions, Sitabai beat Vimal in presence of Kamal. Hence, Kamal returned home and told this fact to her mother Sarubai. Two days thereafter, Kamal returned with Sarubai to Solapur to the house of Prakash and Sarubai told Sitabai that Kamal told her that Sitabai was beating Vimal, therefore, she had come to take away Vimal to Bombay. Thereafter, they all returned to Bombay. On the next day Vimal’s mother Sarubai noticed the abdomen of Vimal, she asked Vimal as to what had happened. Then Vimal told Sarubai that Prakash had sexual intercourse with her. Mother Sarubai took her to Doctor and Doctor examined Vimal and found her pregnant. Then P.W.1 Sarubai took Vimal to Solapur. Sarubai told Sitabai

that Prakash had spoiled Vimal. Sitabai said that she was not knowing whether Prakash did or somebody else did. Thereupon, Vimal told her mother that Sitabai would not listen and they should file the complaint. Accordingly, Vimal filed her complaint (Exhibit-11) on 9.11.1993. On the same day, Vimal was sent for medical examination. P.W.3 Dr.Jalak examined Vimal and found her to be seven months pregnant at that time. After completion of investigation, charge sheet came to be filed.

3. In due course, the case was committed to the Court of Sessions. Charge came to be framed against the original accused no.1 Prakash and his mother original accused no.2 Sitabai. The charge against the appellant-Prakash was under Section 376 of IPC and charge which was framed against his mother Sitabai was under Section 376 read with Section 109 of IPC. Both the accused pleaded not guilty and claimed to be tried. It is the defence of the accused that prior to coming to Solapur, Vimal was pregnant and Sitabai had been told to help them in terminating the pregnancy of Vimal. However, as Sitabai did not do so, Sitabai and her son Prakash have been falsely implicated in the present case. It is also the defence of the appellant that Prabhudas husband of Kamal who is sister of Vimal,

Kamal and Sarubai wanted Prakash to marry daughter of brother of Prabhudas by name Nagina. However, Prakash had got married to someone else and hence, Prakash is falsely implicated in the present case. As stated earlier, the learned Judge acquitted Sitabai original accused no.2 i.e. mother of appellant of the offences charged. However, the learned Sessions Judge convicted and sentenced the appellant as stated in para no.1 above. Hence, this appeal.

4. I have heard Mrs.Rutuja Ambekar, learned advocate for the appellant and Mr.A.S.Shitole, the learned A.P.P. for the State. I have also perused the evidence on record. After carefully considering the matter, I am of the opinion that this appeal deserves to be allowed.

5. The main witness in the present case is P.W.2 Vimal. P.W.2 Vimal is the prosecutrix. As the prosecution story in para 2 above has been taken from the examination-in-chief of P.W.2 Vimal, I do not feel it necessary to repeat the same here as it would only further burden the judgment. Briefly stated from the evidence of P.W.2 Vimal, it has come on record that she was sent by her mother Sarubai alongwith Appellant. She resided at the house of

appellant and his mother for many months. In the said period, the appellant committed rape on her many times. The appellant threatened Vimal to keep quiet and hence she did not disclose this fact to anyone till she was seven months pregnant. However, it is seen that evidence of P.W.2 Vimal is full of omissions. The omissions are on material aspects. In the present case, it appears that whatever happened between the appellant and P.W.2 Vimal, happened by consent of Vimal. The appellant and Vimal were residing in a room which was constructed in the compound of Civil Hospital at Solapur. There were other rooms near the room of the appellant. People were residing in those rooms and these houses have common W.C. In such case, if such act had not happened with the consent of Vimal, Vimal would have made a complaint to the neighbouring persons or to any authority in the hospital. The hospital being a civil hospital, a policeman would always be on duty. In such case, Vimal could have made complaint to the policemen there. It is not the case of Vimal that she was locked up in the house of the appellant. Thus, Vimal had an ample opportunity to move out of the house. As stated earlier, there was common W.C. hence, there was enough opportunity for Vimal to meet neighbouring people and to seek their help if she wanted to do so. It has also come on record

that the accused used to take Vimal for walks, to the Cinema etc. If Vimal did not like the company of the appellant, she would not have accompanied him to all these public places. Moreover, at all these public places, Vimal had every opportunity of making a complaint to anyone or to seek help. Moreover, Vimal could have easily written a letter to her mother or sister and informed them about what had happened and sought their help. However, Vimal did not do so. It has also come on record that the ladies from the neighbouring houses were visiting the house of the appellant. In such case, there was an ample opportunity for Vimal to seek their help if she really had any grievance against Prakash. The fact that she did not make any complaint to anyone in the long period of over seven months shows that Vimal had no objection to what was going on.

6. It has also come on record that the paternal uncle of Vimal, Ramchandra Londhe had come to the house of the appellant and he met Vimal there. The paternal uncle Ramchandra Londhe made enquiries about the well being of Vimal and he was in the house of appellant for about two hours. If Vimal had any objection to the act of the appellant, she would have informed her paternal uncle Ramchandra Londhe and sought his help. However, Vimal did not

do so. This again shows that Vimal had no grievance and she was happy with the state of affairs.

7. It has also come on record that Kamal the sister of Vimal came to Solapur. Vimal had stated that she wanted to speak to Kamal but Prakash did not leave her alone. She has also stated that she wanted to go with Kamal but the appellant threatened that if she tried to go, he would beat her. However, both these statements that she could not speak to Kamal as Prakash did not leave her alone and that Prakash threatened her that if she tried to go, he would beat her, are omissions. From this, it is clear that there was no threat on the part of Prakash. If Vimal wanted to accompany Kamal, there was nothing to prevent her from doing so. Kamal stayed at the house of appellant for more than one day. In such case, there was an ample opportunity for Vimal to make complaint to Kamal about the act of the appellant and to seek her help. The very fact that she has not done so, shows that what was going on, was going on with her consent.

8. I have already observed earlier that the evidence of Vimal is full of omissions. Some of the material omissions are that both the accused had threatened her that they would kill her if she says

anything to anybody. Her statement that Sitabai was asking her not to state anything about the incident, is an omission. Besides this, Vimal has stated that when Prakash had first sexual inter course with her, she tried to raise shouts but Prakash threatened her that if she shouted, he would kill her. This statement is also an omission. So also the statement that Vimal wanted to go with Kamal, but Prakash threatened her that if she tried to go with Kamal, he would beat her, is also an omission. It is the case of Vimal that Kamal came to her and in the presence of Kamal the mother of the appellant beat Vimal, hence, Vimal's sister Kamal went and told this fact to her mother Sarubai and within two days, her mother had arrived at Solapur to take her back to Bombay as Sitabai was beating her. However, all these statements have turned out to be omissions. Besides these omissions, there are number of other omissions also. The effect of all these omissions is to shake the veracity of the evidence of Vimal and in view of these omissions, I find her evidence to be unreliable.

9. There is one other aspect which is necessary to consider, that is the defence of the accused. The defence of the accused is that when Vimal came to Solapur, she was already pregnant and he has been

falsely implicated in this case. The defence of the accused has been specifically stated in para no.3 above. In this connection, it is necessary to note the evidence of P.W.2 Vimal and her mother P.W.1 Sarubai. On the same day when the complaint was lodged i.e. on 9th November, 1993, Vimal was sent for medical examination and as per the evidence of P.W.3 Dr. Jalak, Vimal was found to be seven months pregnant at that time. This would mean that the appellant had sexual inter course with Vimal about seven months prior to the filing of the complaint. However, it is the specific case of Vimal that the appellant had sexual inter course with her after Vimal went to the house of appellant at Solapur. According to P.W.1 Sarubai i.e. mother of Vimal, Vimal had stayed at Solapur for about 4-5 months. In such case, if Vimal had stayed at Solapur only for 4-5 months, the defence of the appellant that Vimal was pregnant prior to her coming to Solapur, appears to be probable in view of the fact that Vimal was seven months pregnant when her complaint came to be recorded. As far as the evidence of Vimal is concerned, in her examination-in-chief, Vimal has stated that eight months after she came to Solapur, her sister Kamal came to Solapur. Her evidence further shows that Kamal returned back and reported the fact of Vimal being beaten by Sitabai

to her mother and within two days, her mother Sarubai came to Solapur for taking Vimal back to Bombay. They came back to Bombay and on next day, her mother found that Vimal was pregnant hence, within two days they reached to Solapur and confronted the accused and on the very day, the complaint came to be filed. This means that within a week at the most of Kamal's coming to Solapur, complaint came to be filed and Vimal came to be medically examined. As per her examination in chief, Vimal had stated that her sister Kamal came to Solapur about 8 months after she came to Solapur. However, in her cross examination, it has been brought on record that in the F.I.R. she had stated that Kamal came to Solapur about five months after Vimal came to Solapur. Thus, this clearly shows that Vimal came to Solapur about 5 months prior to Kamal coming to Solapur. The complaint was lodged within a week of Kamal coming to Solapur. However, the pregnancy of Vimal was found to be seven months on the date when the complaint was lodged. In such case, the defence taken by the appellant, appears to be more probable that Vimal was pregnant prior to her coming to Solapur and he has been falsely implicated. Even otherwise, looking to the evidence of Vimal, I find it to be quite unnatural. If her conduct is taken into consideration, it appears that

even if at all the intercourse between appellant and Vimal had taken place, it had taken place by consent.

10. It may be stated here that Vimal had tried to contend that she was a minor when the incident occurred i.e. when her complaint was filed she gave her age as 16 years. However, Vimal was sent for ossification test. The report of the said ossification test shows that her age is between 14 to 16 years. However, P.W.6 Dr.Satghare who performed ossification test, has admitted that in respect of ossification test, the margin of error is two years on either side. This would mean that Vimal could be 18 years of age. The medical papers also show that her secondary sexual character was well developed. P.W.6 Dr.Satghare has clearly deposed on this aspect and given the details thereof. Thus, the medical evidence shows that the age of Vimal could be upto 18 years of age. Vimal has specifically stated that she has not attended school. There is no reason to accept the statement of Vimal that she did not attend school. If the statement of Vimal is accepted that she did not attend school, there is no question of considering any certificate produced by the prosecution in respect of age of Vimal. From the evidence on

record, it can be said that Vimal was above the age of 16 years. Looking to all these facts, I am of the opinion that the appellant is entitled to the benefit of doubt.

11. In the result, this appeal is allowed. The judgment and order of conviction and sentence dated 15th March, 1995 passed by the learned Sessions Judge, Solapur in Sessions Case 57 of 1994 is set aside. The appellant is acquitted of the offence under Section 376 of IPC. The fine amount if any, paid by the appellant, be refunded to him. The appellant is on bail. His bail bonds shall stand cancelled.

[V.K.TAHILRAMANI.J]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.138 OF 1995
(Prakash Suryabhan Londhe Vs. The State of Mah. & Anr.)

Office Notes, office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Mrs. Rutuja Ambekar Advocate for Appellant
Mr.A.S.Shitole, A.P.P. for State
None for respondent no.2 though served.

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : DEC.15, 2004

. For the reasons mentioned separately in the judgment, the following order is passed:

. In the result, this appeal is allowed. The judgment and order of conviction and sentence dated 15th March, 1995 passed by the learned Sessions Judge, Solapur in Sessions Case 57 of 1994 is set aside. The appellant is acquitted of the offence under Section 376 of IPC. The fine amount if any, paid by the appellant, be refunded to him. The appellant is on bail. His bail bonds shall stand cancelled.

(V.K.TAHILRAMANI,J.)